NO. 85-491

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM 1985

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ANTHONY RAZZANO, EARNEST WALLACE,
JOE TIPPETT, d/b/a T & W TRUCKING COMPANY,

Petitioners,

vs.

DUNLOP TIRE & RUBBER CO., INC.,

Respondent.

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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W. JAMES CHANDLER
1512 E. Fourth Street
P.O. Box 35246
Charlotte, NC 28235
704-376-6527

Counsel for Petitioners

APPELLATE PRINTING SERVICES, INC., HERITAGE BLDG., RICHMOND, VA (804) 643-7789

1/6 pd

## QUESTION PRESENTED

Did the Order of the United States District Court dismissing Appellants' cause of action in strict liability constitute reversable error?

## PARTIES

The parties to this proceeding are petitioner Anthony Razzano, Earnest Wallace, Joe Tippett, d/b/a T & W Trucking Company and respondent Dunlop Tire & Rubber Co., Inc.

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SUPREME COURT OF THE UNITED STATES

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ANTHONY RAZZANO, EARNEST WALLACE,
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PETITION FOR WRIT OF CERTIORARI
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---

Petitioners, Anthony Razzano, Earnest Wallace, Joe Triplett, d/b/a T & W Trucking Company, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered April 16, 1985.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, entered on April 16, 1985 is unpublished, but is reproduced in the appendix of this petition, p. 1a, infra. Its unreported order denying rehearing entered on July 1, 1985 is reproduced at p. 1b, infra.

The United States District Court wrote no opinion. Its unreported final judgment, entered on November 23, 1983 is reproduced in the appendix, p. 1c, infra.

## JURISDICTION

The Appellants named herein, in apt time and in open court, gave Notice of Appeal from the Judgment of the United States Court of Appeals for the Fourth Circuit, November 23, 1983. That from the Judgment of the United States Court of Appeals dated April 16, 1985 (Judge Widener dissenting) the Appellants timely filed Petition for

Rehearing and Suggestion for Rehearing In Banc, p. a, infra.

Judgment of the United States Court of Appeals denying the Petition for Rehearing (Judge Widener dissenting) was entered July 1, 1985, p. 1b, infra.

The jurisdiction of this Court to review the final judgment of the United States Court of Appeals for the Fourth Circuit is invoked pursuant to 28 USC § 1254(1).

STATUTORY PROVISIONS

Tennessee Code Annointed §29-28-105:

(a) A manufacturer or seller or a product shall not be liable for any injury to person or property caused by the product unless the product is determined to be in a defective condition or unreasonably dangerous at the time it left the control of the manufacturer or seller.

(b) In making this determination the state of scientific and technological

knowledge available to the manufacturer or seller at the time the product was placed on the market, rather than at the time of injury, is applicable. Consideration is given also to the customary designs, methods, standards and techniques of manu-facturing, inspecting and testing by other manufacturers or sellers of similar products.

(c) The provisions of this section do not apply to an action based on express warranty or misrepresentation regarding the chattel.

(d) A product is not unreasonably dangerous because of failure to adequately warn of a danger or hazard that is apparent to the ordinary user.

STATEMENT OF THE CASE

On May 8, 1981, Appellants' purchased from the Defendant Dunlop Tire & Rubber Company a truck tire and mounted same on

the right front steering axle of a tractor trailer unit owned by the Appellants. On June 21, 1981, Appellant Razzano was operating that unit on Interstate Highway 40 at Jefferson City, Tennessee when the subject tire exploded, causing the vehicle to leave the roadway, overturn, and produce property damage and personal injury to the Appellant.

By letter of October 26, 1981, Dunlop was notified that initial examination of the tire had revealed a manufacturing defect and when responsibility for the referenced loss was declined, suit was then instituted by the named Appellants in the United States District Court for the Western District of North Carolina, alleging four separate and distinct causes of action:

1 - Strict Liability.

2 - Implied Warranty.

3 - Express Warranty.

4 - Negligence.

In August of 1982, pursuant to Motion filed by the Defendant, the trial court dismissed the Appellants' claim in strict liability, and in November 1983, refused Appellants' Motion prior to trial to reinstitute same, and refused to accept Appellants' request for jury instructions regarding strict liability. Following a jury verdict in favor of the Defendant, the trial court refused the Appellants' Motion pursuant to Fed. R. Civ. P. 50 for a new trial or for Judgment NOV.

From that verdict, Appellants gave Notice of Appeal to the United States Court of Appeals for the Fourth Circuit and hereby petition the United States Supreme Court for a Writ of Certiorari to review the affirmation of the judgment of the District Court by the United States Court of Appeals.

## REASONS FOR GRANTING THE WRIT

The Appellants respectfully submit

that the judgment of the District Court and the affirmation of that judgment by the United States Court of Appeals (Judge Widener dissenting) overlooks or ignores all existing case law and is in obvious conflict with prior decisions of the United States Supreme Court. The majority opinion of the Fourth Circuit Court of Appeals attempts to use a procedural vehicle to reach what the Appellants contend is a result that defies all justice and equity.

Certain salient facts of this case were uncontroverted:

1. The accident occurred in the State of Tennessee and all parties to this litigation were aware of that fact.

2. The substantive rights of the parties are controlled by the law of the State of Tennessee.

3. Tennessee law statutorily recognizes a claim in strict liability (Tenn.

Code Ann. §29-28-105).

4. Pursuant to Motion filed by the Appellees, Dunlop Tire & Rubber Co., the United States District Court struck the Appellants cause of action in strict liability.

5. The striking of Plaintiff's cause of action in strict liability was error and that error was brought to the attention of the trial court before the trial was begun.

6. The trial court refused to correct its error and tried the lawsuit pursuant to the laws of the State of North Carolina.

The Opinion of the Fourth Circuit Court of Appeals (Judge Widener dissenting) acknowledges all of the above facts but then attempts to justify the result by addressing not the dismissal of the Appellants' claim in strict liability, but rather by discussing an ancillary matter, the Rule 60(b) Motion filed by the Appellants prior to the start of the trial.

Whether Fed. R. Civ. P. 60 is applicable to this particular set of facts is totally academic. The Appeal is predicated on the dismissal by the trial court of the Appellants First Cause of Action in Strict Liability.

In a diversity case in Federal District Court, the Court is bound to follow the Choice of Law Rule of the forum state. Klaxon Company v. Stentor Electric Manufacturing Company, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941); Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L. Ed. 1188 (1937); see also Santana, Inc. v. Levi Strauss & Co., 674 F.2d 269 (4th Cir. 1982).

As the Fourth Circuit Court of Appeals pointed out in Santana, supra, "In personal injury and wrongful death cases, North Carolina Courts have unequivocally adhered to the Lex Doci Deliciti rule. In determining the place of the tort, North Carolina

courts apply the generally accepted interpretation of the lex loci rule that the tort is deemed to have occurred where the last event takes place, that is necessary to render the actor liable. Injury being the last element of a tort, North Carolina Rule, in a nutshell, is the law of the place of the injury." Id., at 272 (citing cases); see also, Petrea v. Ryder Tank Lines, Inc., 264 N.C. 230, 141 S.E.2d 278 (1965); Matthews, Cremins, McLean, Inc. v. Nichter, 49 N.C.App. 184, 256 S.E.2d 261 (1979).

In a case similar to the matter at issue, the Fourth Circuit Court of Appeals in Brendle v. General Tire & Rubber Co., 408 F.2d 116 (4th Cir 1969) held that Missouri law applied to the rights of a North Carolina domiciliary who was killed in an accident in Missouri caused by a defective tire manufactured in Ohio and sold in North Carolina. The Fourth Circuit

rejected the Plaintiff's argument that "the most significant relationship" test was applicable and applied to the law of Missouri, the place of the injury.

That is precisely what should have been done in this case.

The Plaintiffs' Complaint included a claim under strict liability in accordance with Tenn. Code Ann. §29-28-105 and the same was erroneously striken by the trial court, which, before trial, refused to correct its error.

The majority opinion of The Fourth Circuit Court of Appeals chooses to ignore all the above facts, the applicable law, and attempts to use a procedural vehicle to reach what the Appellants contend to be a thoroughly unjust result.

The rule of Lex Loic is so ingrained in the laws of North Carolina that there is a specific statute directing the courts

to take judicial notice of the laws of another state when they are applicable (N.C. Gen. Stat. §8-4). The very first contact made by the Appellants with Dunlop Tire Company placed the Defendant on notice that the accident had occurred in the State of Tennessee and there could be no argument of surprise.

The single issue presented for review here is whether the Appellants are entitled to have their cause of action adjudged under the strict liability statute in Tennessee. Under all existing case law and statute, the Appellants were so entitled and the actions of the trial court in striking the Plaintiffs' cause of action in strict liability and the majority opinion of The Fourth Circuit Court of Appeals affirming that action totally contradicts any sense of justice and all prior Decisions of the United States Supreme Court. The Appellants' position on this issue is

concisely spoken to by the dissent of Judge Widener, a copy of which is attached to Appellants' Petition, p.21a, infra.

## CONCLUSION

For these various reasons, the petition for certiorari should be granted, to the end of remanding the case for a new trial based on errors of law committed in the original proceeding.

Respectfully submitted,

W. James Chandler
1512 East Fourth Street
PO Box 35246
Charlotte, NC 28235
704-376-6527

Counsel for Petitioners

# APPENDIX

(UNPUBLISHED)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-2181

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Anthony Razzana, Earnest Wallace,
Joe Tipett, T & W Trucking Company,

Appellants,

and

Desota Trails, Inc.,

Plaintiff,

versus

Dunlop Tire & Rubber Co., Inc.,

Appellee.

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Appeal from the United States
District Court for the Western District
of North Carolina, At Charlotte.
Robert D. Potter, District Judge.
(C/A C-C-82-0404-P)

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Argued: October 31, 1984
Decided: April 16, 1985

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Before
WIDENER, PHILLIPS,
and
ERVIN,
Circuit Judges

W. James Chandler (Haynes, Baucom, Chandler, Claytor and Genton, P.A.) for Appellants; W. Donald Carroll, Jr., H. Landis Wade, Jr., (Helms, Mulliss & Johnston) for Appellee.

ERVIN, Circuit Judge:

The plaintiffs, Anthony Razzana, Earnest Wallace, Joe Tippett, and the T & W Trucking Company brought negligence, breach of warranty, and strict liability claims against the defendant, Dunlop Tire & Rubber Company, Inc., to recover for personal injuries and property damage caused by the explosion of a tire purchased from Dunlop that resulted in the overturning of plaintiffs' loaded tractor-trailer rig on Interstate 40. Prior to trial, the district court granted Dunlop's unopposed motion to

dismiss plaintiffs' strict liability claim under North Carolina law. On the day of trial, plaintiffs filed a motion under Rule 60(b) of the Federal Rules of Civil Procedure to amend their complaint to include a strict liability claim asserting that under applicable Tennessee law they were entitled to pursue such a cause of action. This motion was denied by the district court.

At the close of plaintiffs' evidence, Dunlop moved for a directed verdict in its favor on all claims. The district court partially directed the verdict by dismissing all the warranty claims except for T & W's express warranty claim. Before the case was submitted to the jury, the parties agreed to withdraw T & W's express warranty claim from further consideration. On the remaining issue of negligence, the jury returned a verdict in favor of Dunlop.

The district court then denied plaintiffs' post-verdict motion for judgment notwithstanding the verdict or alternatively for a new trial. We affirm.

On appeal, the plaintiffs raise essentially four issues requiring our consideration. First, plaintiffs argue that the district court improperly denied their Rule 60(b) motion to add strict liability as another theory of recovery to their complaint. Second, plaintiffs assert that the district court erroneously dismissed all of their warranty claims except for T & W's express warranty claim. Third, plaintiffs contend that the district court committed numerous trial errors requiring reversal. Finally, they assert that the district court erred when it denied their motion for JNOV or alternatively for a new trial. We will address these arguments seriatim.

I.

FACTUAL BACKGROUND

After the purchase of a single tractor, plaintiffs Tippett and Wallace formed the T & W Trucking Company in early 1981. T & W then purchased two Remington Universal tube-type truck tires from a retail tire distributor not a party to this action. These tires were manufactured by Dunlop and covered by a limited warranty.

On June 21, 1981, Razzana, an employee of T & W, was driving the tractor owned by his employer and pulling a trailer owned by DeSota Trails, Inc., which contained a load of bottled beer weighing approximately 44,000 pounds. The beer was being transported from St. Louis, Missouri, to Franklin, North Carolina. On Interstate 40 near Jefferson City, Tennessee, the vehicle overturned because of a severe blowout in the right front tire, which was one of the

two purchased from Dunlop. The accident completely destroyed the tractor-trailer and injured Razzana.

II.

DENIAL OF THE RULE 60(b) MOTION

Acting on the assumption that North Carolina law applied, Dunlop moved to dismiss plaintiffs' cause of action in strict liability after they filed their complaint. Plaintiffs did not actively oppose this motion. Consequently, the district court dismissed the strict liability claim noting on the order that plaintiffs had agreed to the dismissal. Subsequently, the district court granted plaintiffs' motion to amend the dismissal order to indicate that they had not agreed to (although they never opposed) the dismissal of their strict liability claim. Over one year later, plaintiffs brought a Rule 60(b) motion to reinstate their strict liability claim.

Because this motion was not made until the day of trial, the district court denied it. Plaintiffs assert that the denial of this motion constituted reversible error. We disagree.

However untimely defendant's Rule 60 (b) motion, we recognize that plaintiffs were entitled to assert a claim in strict liability under governing Tennessee law.[1] Manifestly, the district court's dismissal of plaintiffs' strict liability claim was based on a misapprehension of the applicable choice of law rule. In addition, the

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[1] It is well established that federal courts in a diversity action must follow the choice of law rule of the forum state. Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 496 (1941). The applicable choice of law rule in North Carolina is that actions in tort are governed by the law of the place of injury. Santana, Inc. v. Levi Strauss & Co., 674 F.2d 269, 272 (4th Cir. 1982); see also Shaw v. Lee, 258 N.C. 609, 610, 129 S.E. 2d 288, 289 (1963). Since the explosion of the tire occurred in Tennessee, the substantive law of Tennessee

district court's subsequent refusal to grant plaintiffs' Rule 60(b) motion to reinstate their strict liability claim because it was untimely permitted the case to be tried and judgment rendered under an erroneous view of the permissible theories of recovery. We now turn to the question of whether this mistake of law requires reversal.

Plaintiffs' Rule 60(b) motion was brought prematurely. The rule only grants relief to "a party or his legal represenative from a final judgment order, or proceeding." Fed. R. Civ. P. 60(b) (emphasis added). The district court's dismissal of plaintiffs' strict liability claim was an unappealable interloctory order because the order could not be certified for appeal as a

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Foot note 1 continued:

supplies the available theories of recovery in this case. Further, Tennessee law permits recovery for injuries inflicted because of a manufacturing defect based on strict liability. Tenn. Code. Ann. §29-29-105 (1983).

partial final judgment under Rule 54(b) of the Federal Rules of Civil Procedure.

Appeal through certification that there is no just reason for delay is available under Rule 54(b) only if there has been a final determination with respect to one or more but fewer than all of the separate parties or claims in a single action. Fed. R. Civ. P. 54(b); see also Federal Civil Appellate Jurisdiction: An Interlocutory Restatement, Law & Contemp. Probs., Spring 1984, at 28-31 (hereinafter cited as Interlocutory Restatement). Alternative legal theories of recovery do not constitute separate claims under Rule 54(b). Page v. Preisser, 585 F.2d 336, 339 (8th Cir. 1978); CMAX, Inc. v. Drewry Photocolor Corp., 295 F.2d 695, 697 (9th Cir. 1961); Schwartz v. Eaton, 264 F.2d 195, 197 (2nd Cir. 1959); see also Interlocutory Restatement, supra, at 31. Plaintiffs'

negligence and strict liability claims were merely alternative legal theories and not separate claims subject to certification under Rule 54(b). Moreover, the district court never certified its dismissal order for appeal in compliance with the requirements of Rule 54(b). Because the district court's of the strict liability claim was not a final order, plaintiffs' Rule 60(b) motion was improper.

Given the impropriety of the Rule 60(b) motion, we are required to consider it as a motion by the plaintiffs to amend their complaint under Rule 15 of the Federal Rules of Civil Procedure. Because plaintiffs did not bring this motion until the day of trial, they could amend their complaint only by leave of the district court. Fed. R. Civ. P. 15(a). The denial of plaintiffs' motion to amend their complaint cannot be reversed unless we find

that the district court abused its discretion. See Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330 (1971); Karkell v. Blue Shield, 687 F.2d 543, 550 (1st Cir. 1982).

Although recognizing that the dismissal of the strict liability claim may have been based on mistake, the district court denied the motion explaining:

> (I)f we allow people to come in here and change the theory, particularly after the time that you have had to advise the Court or make the motion based on mistake, the other party is never going to be able to prepare his defense because (Dunlop), I assume, has gone on the theory that strict liability is not applicable in this case because that count was dismissed, so I am going to have to deny your motion.

(JA 94). Plaintiffs did not oppose Dunlop's motion to dismiss their strict liability claim. Rather, they waited until a year had passed and the day of

trial had arrived to assert that their strict liability claim should be reinstated. Plaintiffs offered no reason for their delay. Although we might have reached a different conclusion,[2] we are firmly convinced that the district court's refusal to permit amendment of the complaint on the day of trial was not an abuse of discretion.[3]

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[2]To avoid unnecessary appeals such as this one, we would have permitted plaintiffs to amend their complaint and granted Dunlop a continuance to avoid undue prejudice. Our choice, however, is of no consequence in this matter. The only question is whether the district court's denial of the motion was so extraordinary and unjustified that it constituted an abuse of discretion.

[3]Despite our preferred characterization, we note that plaintiffs' mischaracterized Rule 60(b) motion could also be considered a motion to amend the district court's Pretrial Order limiting the "legal contentions" and "claims for relief" to those alleged before January 28, 1983, absent good cause to extend the deadline. Under this alternative avenue of analysis, however, our conclusion that the district court did not abuse its discretion by refusing to permit plaintiffs to add belatedly another theory of recovery is equally

See, e.g., Kirby v. P. R. Mallary & Co., 489 F.2d 904, 912 (7th Cir. 1973), cert. denied, 417 U.S. 911 (1974) ("It would be unjust to permit an untimely amendment, materially altering the basis of the action, necessitating additional discovery, conferences, and pretrial orders and statements. . . ." especially when the plaintiff "showed no reason for this delay."); Vine v. Beneficial Finance Co., 374 F.2d 627, 637 (2d Cir.), cert. denied, 389 U.S. 970 (1967) (no abuse of discretion to deny amendment of complaint

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Footnote 3 continued

compelled. Since a pretrial order under Fed. R. Civ. P. 16 may be "modified only to prevent manifest injustice," while Fed. R. Civ. P. 15(a) permits amendment of the complaint "when justice requires," the district court has even greater discretion to decline to modify a pretrial order than an untimely request to amend the complaint. Whether plaintiffs' mischaracterized Rule 60(b) motion is deemed a request to amend their complaint or modify the pretrial order, the district court acted safely within its wide discretion in these two important areas of pretrial procedure.

because of undue delay); Stanek v. Trialmobile, Inc., 283 F.2d 827, 829 (7th Cir. 1960) (district court's refusal to permit amendment of the complaint to state a new cause of action on the day of trial was not an abuse of discretion because the delay was "without any reason").

III.

DISMISSAL OF THE WARRANTY CLAIMS

Plaintiffs argue that the district court erroneously dismissed their implied warranty claims because N.C. Gen. Stat. 99B-2(b) (1979) violates the equal protection clause of the fourteenth amendment. Essentially, plaintiffs contend that because N.C. Gen. Stat. 99B-2(b) permits employees of a purchaser not covered by workers' compensation to maintain a product's liability action directly against the manufacturer despite their lack of privity, while not allowing employees covered by

workers' compensation to bring such an action, the statute violates the equal protection clause. This argument is unpersuasive.

Because N.C. Gen. Stat. 99B-2(b) neither involves a suspect class nor impermissiblty burdens a fundamental right, it is persumptively constitutional and the distinctions drawn thereunder must merely bear a rational relationship to any imaginable legitimate state interest. Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955); see also City of New Orleans v. Dukes, 427 U.S. 297, 305 (1976); Katzenback v. Morgan, 384 U.S. 641, 657 (1966). The clear legislative purpose behind the N.C. Gen. Stat. 99B-2(b) is to protect only those employees who are not already entitled to recover for their losses under workers' compensation. That legitimate state objective is clearly

furthered by giving only employees not covered by workers' compensation the right to maintain an action for breach of implied warranty. Accordingly, N.C. Gen. Stat. 99B-2(b) is not constitutionally infirm under the equal protection clause.

IV.

ALLEGATIONS OF TRIAL ERRORS

Having assumed that the cumulation of many meritless claims will result in a favorable disposition on appeal, plaintiffs argue exhaustively that the district court committed approximately seventeen separate trial errors. Without discussing each allegation of error, we conclude after having carefully reviewed the record and the briefs that none of plaintiffs' asserted trial errors are sufficiently meritorious to warrant reversal. Thus, we refuse to disturb the district court's trial rulings.

V.

POST-TRIAL MOTIONS

Finally, plaintiffs contend that the district court erroneously denied their motion for JNOV or alternatively for a new trial. We find that these contentions are also without merit.

The denial of a motion for JNOV cannot be reversed on appeal unless there is no evidence upon which a jury could have reasonably returned a verdict for the non-moving party. Wyatt v. Interstate & Ocean Transport Co., 623 F.2d 888, 891 (4th Cir. 1980); Mays v. Pioneer Lumber Corp., 502 F.2d 106, 107 (4th Cir. 1974), cert. denied, 420 U.S. 927 (1975). Absent undisputed facts that "are so convincing that reasonable men could not differ as to their significance," the jury's verdict must be left undisturbed. United States v. Grannis, 172 F.2d 507, 513 (4th Cir.), cert. denied,

337 U.S. 918 (1949). Further refining our standard of review, we are also mindful that where, as here, the "party who bears the burden of persuasion on a particular issue seeks a judgment notwithstanding the verdict on that issue, he must establish that the evidence in support of the motion 'is so one-sided as to be of overwhelming effect.'" Coburn v. Browning Arms Co., 565 F. Supp. 742, 745 (W.D. La. 1983) (quoting Grey v. First National Bank, 393 F.2d 371, 380 (5th Cir.), cert. denied, 393 U.S. 961 (1968); see also Jefferson Amusement Co. v. Lincoln National Life Insurance Co., 409 F.2d 644, (5th Cir. 1969) ("A more stringent standard is imposed on a movant having the burden of proof."); 9 C. Wright & A. Miller, Federal Practice and Procedure, §2536 (1971). Finally, an appellate court must give the nonmoving party the benefit of all reasonable inferences from the evidence

before ruling on a motion for JNOV. Connelly v. Prudential Insurance Co., 610 F.2d 1215, 1220 (4th Cir. 1979). Guided by these principles of review, we conclude that there was more than sufficient evidence upon which a reasonable jury could find that Dunlop did not negligently manufacture the exploded tire. Therefore, the district court correctly denied plaintiffs' motion for JNOV.

No jury verdict may be set aside and a new trial ordered unless "'the verdict is against the clear weight of the evidence, or is based upon evidence which is false or will result in a miscarriage of justice. . . .'" Williams v. Nichols, 266 F.2d 389, 392 (4th Cir. 1959) (quoting Aetna Casualty & Surety Co. v. Yeatts, 122 F.2d 350, 352 (4th Cir. 1941)); accord Ellis v. International Playtex, Inc., 745 F. 2d 292, 298 (4th Cir. 1984); States v. Shipp, 409 F.2d

33, 36 (4th Cir.), cert. denied, 396 U.S. 864 (1969). The district court has wide discretion in determining whether to order a new trial. Huber v. Nassau County, 557 F.2d 322, 325 (2d Cir. 1977). The record in this case reveals that the verdict exonerating Dunlop was amply supported by the evidence produced at trial. The evidence was credible and there was no miscarriage of justice. Hence, the verdict was not against the clear weight of the evidence and the district court's denial of the motion for a new trial was not an abuse of discretion.

In accordance with our resolution of the foregoing issues, the decision of the district court is hereby

AFFIRMED.

WIDENER, Circuit Judge, dissenting:

I respectfully dissent.

The preliminary procedural aspects of the trial in question were all that started on the afternoon of November 9th, the first day of the trial. Little was done on that day except strike the jury, and even that may not have been completed because the jury was not impaneled until November 10th.

It was on that day that the Plaintiffs' attorney filed his motion calling to the attention of the court that its prior ruling striking out that part of the complaint with respect to strict liability was erroneous. It is now acknowledged, even by the defendant, that the previous ruling of the district court, applying North Carolina rather than Tennessee law, was in error.

At that time, as the majority acknowledges in notes 2 and 3 of its opinion,

the district court should have asked the defendant if it requested a continuance on account of the correct law being brought to the attention of the court. If the defendant had stated that it did, the court should have continued the case, and, especially if it felt that the plaintiffs were somehow at fault and the defendant was not, it should have required the plaintiffs to pay all costs and expenses of the delay. I think the failure of the district court to pursue this course is an abuse of discretion and that the case should be remanded for a new trial.

If the matter of the application of Tennessee law had been (Unknown to the defendant) deliberately withheld by the plaintiffs from the district court, I would agree that the court did not abuse its discretion in proceeding as it did. But there is no intimation that such is the case.

The most that can even be claimed is that the failure to bring the law of Tennessee to the attention of the district court until November 9th was at most inadvertence, and I suggest that if there is any fault or inadvertence it must be shared by the attorneys for both sides.

In all events, if the attorney for the plaintiffs had really been wanting to waylay the defendant, all he had to do was not to bring the law of Tennessee to anyone's attention at the time of the trial, saving his error for appeal, and we would have routinely remanded the case for a new trial. As things now stand, the case was tried on an admittedly erroneous theory of law, which everyone knew during the trial, and for which the majority would afford no remedy.

I think the opinion of the majority puts an attorney situated as was the

plaintiffs into an impossible position. If he discloses to the trial court the correct theory of the case, as I conceive he should, he loses. But if he conceals from the trial court the correct theory of the case, as I conceive he should not, then he wins.

Filed July 1, 1985

U.S. COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-2181

Anthony Razzana, Earnest Wallace,
Joe Tippett, T & W Trucking Company,

Appellants,

and

Desota Trails, Inc.,

Plaintiff,

versus

Dunlop Tire & Rubber Co., Inc.,

Appellee

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT CHARLOTTE

The appellants petition for rehearing and suggestion for rehearing in banc were submitted to this Court. In a requested poll of the Court, Judge Widener voted to rehear the case in banc; and all other

Active Circuit Judges voted against rehearing the case in banc. As a majority of the judges voted to deny rehearing in banc, and

As the panel considered the petition for rehearing, Judge Phillips and Judge Ervin voted to deny the petition and Judge Widener voted to grant the petition.

IT IS ADJUDGED AND ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Ervin for a panel consisting of Judge Widener, Judge Phillips and Judge Ervin.

For the court,

John M. Greacen

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

C-C-82-404-P

ANTHONY RAZZANO, Individually, EARNEST WALLACE and JOE TIPPETT d/b/a T & W TRUCKING COMPANY, and DESOTA TRAILS, INC.,

Plaintiffs,

vs

DUNLOP TIRE & RUBBER COMPANY,

Defendant.

J U D G M E N T

THIS MATTER coming on to be heard before the undersigned United States District Judge and a jury at the November 7, 1983 Civil Jury Term and Issues having been submitted to the jury and answered as follows:

(1) Was the Defendant Dunlop negligent in the manufacture of the subject tire?

ANSWER:_____(YES) __X_____(NO)

NOW, THEREFORE IT IS ORDERED, ADJUDGED,

AND DECREED that Judgment be entered for the Defendant and that the Plaintiffs' claims be dismissed, and the costs, not to include attorneys' fees, be assessed by the Clerk against the Plaintiff.

This 23rd day of November 1983.

Robert D. Potter
U.S. District Court Judge

Supreme Court, U.S.
FILED
OCT 15 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-491

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1985

ANTHONY RAZZANO, EARNEST WALLACE,
JOE TIPPETT, d/b/a T & W TRUCKING COMPANY,

Petitioners,

vs.

DUNLOP TIRE & RUBBER CO., INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

# BRIEF IN OPPOSITION

W. Donald Carroll, Jr.
H. Landis Wade, Jr.
HELMS, MULLISS & JOHNSTON
227 North Tryon Street
Charlotte, North Carolina 28202

Counsel For Respondent

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## QUESTION PRESENTED FOR REVIEW

Whether the Fourth Circuit Court of Appeals properly affirmed the trial court's dismissal of the strict liability claim invited by the error of the petitioners.

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## PARTIES TO THE PROCEEDING

The parties to the proceeding are Anthony Razzano, Earnest Wallace, Joe Tippett, d/b/a T&W Trucking Company, and Dunlop Tire and Rubber Co., Inc. The correct corporate name of the respondent is Dunlop Tire and Rubber Corporation. Dunlop Tire and Rubber Corporation is an indirect subsidiary of Dunlop Holdings PLC.

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## STATEMENT OF THE CASE

This is a product liability action filed by the petitioners against Dunlop Tire & Rubber Co., Inc. (hereinafter referred to as "Dunlop"), the manufacturer of a tube--type truck tire. The complaint in this action was filed on July 2, 1982. (J.A. 11-20)* It did not allege where the accident complained of occurred, but the allegations of the petitioners, North Carolina residents, implied it happened in North Carolina. In its initial response to the complaint, filed on August 16, 1982 Dunlop moved for a motion to dismiss the strict liability claim in the complaint (J.A. 21) along with a Memorandum of Law in Support of that motion (J.A. 27). Dunlop's Memorandum

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*J.A. represents the Joint Appendix filed with the United States Court of Appeals for the Fourth Circuit.

of Law assumed the accident occurred in North Carolina and simply pointed out that this cause of action does not exist in this state.

Counsel for petitioners did not submit a written memorandum in response to that motion and on September 30, 1982, when the motion to dismiss came on for hearing before the district court, counsel for the petitioners did not cite any authority or offer any factual argument in opposition to the motion. Thereafter, the court drafted and entered an order dismissing the strict liability claim. This order was executed and filed on the day of the hearing and stated in part that the petitioners had agreed to a dismissal of this count. (J.A. 32). On October 4, 1982, the petitioners' attorney wrote a letter to United States District Judge Robert D. Potter regarding the wording of the court's order dismissing

the strict liability claim.[1] That letter reads in part as follows:

> I do concede that the present status of North Carolina law will not allow me to proceed on a strict liability theory in this case, and to that extent concede that a dismissal is proper.

For the first time on the day of trial petitioners asserted to the court that the accident occurred just over the state line in Tennessee, not North Carolina, and that a new cause of action based upon Tennessee's law of strict liability should be added to the suit. Petitioners' counsel admitted he was dilatory in bringing the new facts on which his motion was based to the court's attention:

> and I will accept the responsibility for being dilatory about that. There is absolutely nothing I can say in that regard other than I am and I have no excuse and I don't propose to offer one. (J.A. 91).

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[1] The letter by petitioners' attorney was made a part of the Joint Appendix by order of the Fourth Circuit dated January 28, 1985.

Based on the facts before it, the trial court concluded that it would be unfair to allow the petitioners on the day of trial to assert a new theory of recovery and denied petitioners' motion as follows:

> All right, sir. Mr. Chandler, if we allow people to come in here and change the theory, particularly after the time that you've had to advise the court or make the motion based on mistake, the other party is never going to be able to prepare his defense. . .(J.A. 94).

The trial lasted over a week and consisted of testimony, most of it by experts about the tire, which gave the jury an exhaustive view of how and why the tire failed. The case was presented to the jury on the issue of Dunlop's negligence. The jury believed the evidence offered by Dunlop and returned a verdict finding that Dunlop was not negligent in the manufacture of the tire. (J.A. 77-78) The trial court entered judgment on November 30, 1983 and by order dated January 17, 1984, the district court denied petitioners' motion for judgment

notwithstanding the verdict or in the alternative for a new trial. (J.A. 86-88)

On appeal before the Fourth Circuit, the petitioners asserted in a shotgun approach that the trial court committed numerous errors of law. Among the many arguments posed to the court, the petitioners argued that the strict liability claim was improperly dismissed. The panel of the Court of Appeals hearing this appeal correctly stated with respect to this allegation that the petitioners had never opposed the dismissal of the strict liability claim:

> Plaintiffs did not oppose Dunlop's motion to dismiss their strict liability claim. Rather, they waited until a year had passed and the day of trial had arrived to assert that their strict liability claim should be reinstated. Plaintiffs offered no reason for their delay.

Razzano v. Dunlop, Slip. Op. No. 83-2181, p. 4, p. 7 (4th Cir. April 16, 1985) (Pet. A. 11a.) The panel then stated that it was

"firmly convinced" that the district court's refusal to permit amendment on the day of trial was a proper exercise of the trial court's discretion and not an abuse of discretion. (Pet. A. 12a)

On April 24, 1985, the petitioners submitted a petition for rehearing or in the alternative, suggestion for rehearing in banc. The petitioners enumerated seventeen reasons for this requested relief, among them its claim that the strict liability count was improperly dismissed. On July 1, 1985, the petitions for rehearing and for rehearing in banc were denied. This matter is before this court on petition for writ of certiorari.

## SUMMARY OF ARGUMENT

It is a fundamental principle that litigants are barred from raising on appeal issues not properly raised before the trial court below. Petitioners are foreclosed from challenging the dismissal of the strict

liability claim because they failed to oppose the motion seeking its dismissal and conceded that the dismissal of that claim was proper. The Federal Rules of Civil Procedure require that a party make known to the court its objections to any action by the court and the grounds in support of each objection in order to preserve an objection for appeal. Petitioners failed to object and were dilatory in bringing the facts before the court which would have presented a basis for a different ruling. Having consented to the court's action, petitioners cannot now complain about an error which they invited the court to commit.

## ARGUMENT

### I. Petitioners Have Not Stated Sufficient Considerations In Their Petition To Invoke This Court's Discretion For Review On Writ of Certiorari.

Rule 17 of the Rules of the Supreme Court of the United States sets forth specific considerations governing review on

certiorari. Petitioners asserted as a reason for granting the writ that "the judgment of the District Court and the affirmation of that judgment by the United States Court of Appeals (Judge Widener dissenting) overlooks or ignores all existing case law and is in obvious conflict with prior decisions of the United States Supreme Court." (Pet. B. 6-7) Petitioners do not point to any specific cases, however, that are in conflict with the opinions below but instead rely upon their mischaracterization of the facts to support their position in this petition. The opinions below are not inconsistent with the cases cited by the petitioners regarding the substantive rights of parties injured in the State of Tennessee. Rather the opinions below are consistent with those cases as well as the rules and cases which prevent a party from leading a court into error to benefit from the mistake. There is no dispute that Tennessee

has a statute recognizing a cause of action in strict liability. There is no dispute that North Carolina adheres to the choice of law rule of lex loci delicti. Yet the failure to offer petitioners the remedy of strict liability by application of the doctrine of lex loci delicti does not conflict with those cases which apply that doctrine. The facts in the case at bar are quite different because petitioners failed to set forth for the court the essential facts -- the fact that the accident occurred in Tennessee -- in order for the court to apply the lex loci delicti rule. The opinions below, therefore, do not conflict with any of the decisions of any federal courts of appeals on the same subject matter, nor do they raise any important questions of federal law which have not been, but should be settled by this Court.

II. The Court Of Appeals Properly Affirmed The Trial Court's Dismissal Of The Strict Liability Claim Invited By The Error Of The Petitioners.

Rule 46 of the Federal Rules of Civil Procedure dispenses with the requirement that a party make a formal exception on the record to rulings or orders by the court. This rule, however, does require an affirmative act by a party to preserve an error for appeal:

> [I]t is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; (Emphasis added.) FED. R. CIV. P. 46.

Accordingly, it is "necessary for the party to make it clear to the court that he objects to the court's action, and to state the grounds on which he bases his objection, in order that the defect may be obviated, if possible. . . ." 5A J. Moore, Moore's Federal Practice, ¶ 46.02 (2d Ed. 1976). As pointed out in Bucy v. Nevada Const Co., 125

F.2d 213, 218 (9th Cir. 1942) regarding the early discussions of Rule 46:

> The function of an exception was to bring pointedly to the attention of the trial judge the importance of the ruling from the standpoint of the lawyer and to give the trial judge an opportunity to make further reflection regarding his ruling. Proceedings of Institute, Washington, D.C., 1938, P. 87. In justifying the rule it was stated 'the exception is no longer necessary, if you have made your point clear to the court below.' Proceedings of Institute, Cleveland, 1938, P. 312. 'But of course it is necessary that a man should not spring a trap on the court. . ., so the rule requires him to disclose the grounds of his objections fully to the court.' Proceedings of Institute, Washington, D.C., 1938, P. 124; see also P. 87.

As stated in Rudick v. Prineville Mem. Hosp., 319 F.2d 764 (9th Cir. 1963), the requirements of Rule 46 that a party make known to the court his objections to the court's action is not a mere technicality but has a genuine purpose which is "essential to the orderly administration of justice." 319 F.2d at 770. In that case,

the appellant was foreclosed from complaining on appeal about the actions of the trial court which were not objected to by that party. See also Codex v. Milgo Electronic Corp., 717 F.2d 622, (1st Cir. 1983), cert. den., 104 S.Ct. 1719 (1984), (no objection to the action of the district court at the time of the ruling on Codex's motion for summary judgment, although it had an opportunity to do so, forecloses review of the issue).

Application of these principles to the facts under consideration by this Court make it clear that the petitioners failed to comply with the purpose of Rule 46 of the Federal Rules of Civil Procedure. At the hearing before the trial court on Dunlop's motion to dismiss the strict liability claim, the petitioners conceded the issue and caused the court to enter an order dismissing the strict liability claim on that basis. The petitioners failed to

oppose the motion to dismiss either by brief or oral argument. This failure to make known, at the time the matter was properly before the trial court, the basis of petitioners objection, if any, forecloses appellate review of that issue.

Under the doctrine of "invited error," 5 Am.Jr.2d Appeal and Error §713 (1962), a party against whom a ruling is made will not be allowed to contend for the first time on appeal that the ruling was error when the trial ruling was caused by the neglect of that party, or where that party led the court into error. In order for the doctrine to apply, "it is sufficient that the party who on appeal complains of the error has contributed to it." 5 Am.Jur.2d Appeal and Error §713 (1962). Here petitioners contributed to the error by neglecting or omitting to bring to the trial court's attention that there was a factual basis - the accident happening in Tennessee - to support a strict

liability claim. Indeed, petitioners' counsel's October 4, 1982 letter to the trial court shows petitioners believed North Carolina law applied to the strict liability issue. Having failed to bring the pertinent underlying facts to the court's attention, facts which were at that time peculiarly within petitioners knowledge, petitioners cannot now complain on appeal. See Byrd v. Wolff, 490 F.2d 1277 (8th Cir. 1974) (factual issue not before trial court at time of motion for summary judgment could not be raised on appeal).

## CONCLUSION

For the reasons set forth above, respondent respectfully requests that the court deny the petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

This the 10 day of October, 1985.

HELMS, MULLISS & JOHNSTON

By: W. Donald Carroll, Jr.
W. Donald Carroll, Jr.

H. Landis Wade, Jr.
227 North Tryon Street
Charlotte, North Carolina 28202
Telephone: (704) 372-9510

Attorneys for Respondent.

## CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Brief in Opposition to Petition For Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit by mailing three copies thereof, first-class postage prepaid, to:

W. James Chandler
1512 East Fourth Street
PO Box 35246
Charlotte, NC 28235

This 10 day of October, 1985.

W. Donald Carroll, Jr.